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Discovery of Government Attorney Work Product under the FOIA

INTRODUCTION

The Freedom of Information Act (FOIA)¹ was enacted in 1966 to promote good government by increasing agency accountability to citizens, legislators and the press.² The Act was intended to bring government activities into the "sunshine."³ However, the Act also has been recognized as a valuable supplement to discovery under the Federal Rules of Civil Procedure (FRCP).⁴ In fact, the primary users of FOIA procedures have been attorneys seeking not to oversee government activities, but rather to press private claims.⁵ This use has raised numerous questions about the scope of the FOIA exemptions from disclosure and the mesh between the exemptions and the discovery privileges under the FRCP.

The FOIA mandates disclosure of government documents⁶ subject only to seven specified exemptions.⁷ One of these exemptions, Exemption 5,⁸ incorporates into the FOIA the privileges normally available to a party engaged in civil litigation, including the attorney work product privilege.⁹ Application of the

¹ 5 U.S.C. § 552 (1976).

² See generally SENATE COMMITTEE ON THE JUDICIARY, FREEDOM OF INFORMATION ACT SOURCEBOOK, S. DOC. NO. 82, 93d Cong., 2d Sess. (1974) (reprints legislative history, case summaries and law review articles) [hereinafter cited as FOIA SOURCEBOOK].

³ See generally J. O'REILLY, FEDERAL INFORMATION DISCLOSURE §§ 2, 4 (1978).

⁴ See Levine, *Using the Freedom of Information Act as a Discovery Device*, 36 BUS. LAW. 45, 55 (1980-81); Fleming, *The Freedom of Information Act: An Important Discovery Aid in Labor Law Cases*, 53 FLA. B.J. 603 (1979). For a view that the benefits of the Freedom of Information Act [hereinafter cited as FOIA] as a discovery device may be overstated, see Toran, *Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules*, 49 GEO. WASH. L. REV. 843, 854-59 (1980-81). However, it should be noted that a primary advantage of FOIA disclosure is that it is available *before* the commencement of a civil action.

⁵ The courts have not always approved this use. See *Renegotiation Bd. v. Banner-craft Clothing Co.*, 415 U.S. 1, 22 (1973).

⁶ 5 U.S.C. § 552(a).

⁷ *Id.* § 552(b).

⁸ 5 U.S.C. § 555(b)(5) provides: "This section does not apply to matters that are . . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

⁹ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Work product can be

discovery rules in the FOIA context is not without difficulty, however.¹⁰ Lower courts have often reached conflicting results,¹¹ and the United States Supreme Court has said the rules are applicable in this situation only by "rough analogies."¹²

The latest visitor to this "rather unexplored corner of FOIA law"¹³ is the United States Court of Appeals for the District of Columbia Circuit. In *Grolier, Inc. v. Federal Trade Commission* (FTC),¹⁴ the court was confronted with a FOIA request from Grolier for production of documents concerning a closed FTC case against Grolier's subsidiary, Americana Corporation.¹⁵ The agency claimed that the materials were exempt from disclosure as attorney work product. Rather than seizing the opportunity to establish an analytical standard for determining what is protected work product in the FOIA context, the court, against the weight of modern authority,¹⁶ held that the documents could not be protected because the work product privilege, even if applicable, ter-

defined as documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative. See FED. R. CIV. P. 26(b)(3) [hereinafter cited as FRCP]; C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 2024 (1970).

¹⁰ One court has called the application of the attorney work product privilege in the FOIA context a "task that would challenge the fabled Procrustes." *Fonda v. Central Intelligence Agency*, 434 F. Supp. 498, 505 (D.D.C. 1977). According to legend, Procrustes, a bandit who terrorized ancient Greece, forced his victims to fit a certain bed by either stretching their legs or cutting them off.

¹¹ Compare *Exxon Corp. v. Federal Trade Comm'n*, 466 F. Supp. 1088, 1097-98 (D.D.C. 1978), *aff'd*, 663 F.2d 120 (D.C. Cir. 1980) (factual material must be segregated and disclosed) with *St. Louis Post-Dispatch v. Federal Bureau of Investigation*, 447 F. Supp. 31, 37-38 (D.D.C. 1977) (where facts and opinions are "inextricably intertwined," disclosure will not be ordered) and *Wu v. Kenney*, 384 F. Supp. 1161, 1166 (D.D.C. 1974), *aff'd*, 527 F.2d 854 (D.C. Cir. 1975) (even facts such as names and addresses may be protected).

¹² *Environmental Protection Agency v. Mink*, 410 U.S. 73, 86 (1973).

¹³ *Kent Corp. v. NLRB*, 530 F.2d 612, 623 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976).

¹⁴ 671 F.2d 553 (D.C. Cir. 1982), *cert. granted*, 51 U.S.L.W. 3362 (U.S. Nov. 8, 1982) (No. 82-372).

¹⁵ 781 F.2d at 554.

¹⁶ See note 4 *infra* and accompanying text. See also Comment, *Civil Procedure—Discovery—Work Product Privilege Extends to Subsequent, Unrelated Litigation*, 27 VAND. L. REV. 826 (1974) (work product privilege is perpetual). See generally Note, *Discovery of an Attorney's Work Product in Subsequent Litigation*, 1974 DUKE L.J. 799 (general overview of approaches to use of work product privilege in subsequent litigation).

minates once the case, and the potential for related litigation, ends.¹⁷

This Comment first examines the circuit court's assertion in *Grolier* that work product protection is terminable. Upon concluding that such protection should be perpetual, this Comment addresses the issue left open by the court of appeals: the appropriate standard for work product protection in the FOIA context.

I. GROLIER, INC. V. FEDERAL TRADE COMMISSION

In 1972, the United States Department of Justice filed a civil penalty action against Americana Corporation, a subsidiary of Grolier, Inc.¹⁸ The suit alleged violations of an outstanding FTC cease and desist order relating to false advertising and misrepresentation in the door-to-door sales of encyclopedias.¹⁹ The trial judge dismissed the action, with prejudice, on November 17, 1976, after the FTC disobeyed a court order to allow discovery of documents relating to a 1972 covert investigation of Americana.²⁰

During this time, the FTC also was investigating the sales practices of Grolier (the parent company) and its other subsidiaries engaged in the sales of encyclopedias and other books and educational materials. This investigation resulted in a final cease and desist order issued by the Commission on March 13, 1978.²¹

¹⁷ 671 F.2d at 556. The relatedness test suggested by the court seems difficult and uncertain in application, relying as it does on an assessment of hypothetical litigation and, perhaps, a crystal ball. See 671 F.2d at 559 (MacKinnon, J., dissenting); 421 U.S. at 129 n.16 (it is "not sensible" to construe FOIA to require consideration of hypothetical litigation in determining whether Exemption 5 applies).

¹⁸ *United States v. Americana Corp.*, No. 388-72 (D.N.J. filed Feb. 29, 1972), cited in 671 F.2d at 544.

¹⁹ See *Americana Corp.*, 45 F.T.C. 32 (1948), modified, 46 F.T.C. 253 (1949). The FTC found that the following misleading claims (among others) were unfair and deceptive under 15 U.S.C. § 45(a)(1)(1976): claims that Americana was the "unanimous choice" of every government department, board of education and public library; claims that the publication was new, when it was simply a reprint; and claims that the solicitors were not salesmen, but interviewers authorized to make limited special offers to selected prominent persons. 45 F.T.C. at 41-46. The FTC imposed civil penalties of \$16,000 in 1960 and \$100,000 in 1965 for violations of the order. See 3 TRADE REG. REP. (CCH) FTC Dkt. 5085.

²⁰ 671 F.2d at 554.

²¹ *Grolier, Inc.*, 91 F.T.C. 315 (1978). The order required *Grolier* to cease misrepresentations, to make relevant disclosures, and to stop using unfair or deceptive methods in the sale of merchandise or services, the recruitment of sales personnel or the collection of delinquent accounts. *Id.*

Later in 1978, Grolier initiated a request under the FOIA for production of the documents relating to the FTC's investigation of the Americana matter.²² The Commission released numerous documents²³ but withheld certain items, claiming that they constituted attorney work product and were therefore exempt under 5 U.S.C. section 552(b)(5) (Exemption 5).²⁴ Grolier then initiated a FOIA action in the United States District Court for the District of Columbia seeking an order for the production of the documents. The district court denied the order and ruled in favor of the Commission.²⁵

On appeal, the United States Court of Appeals for the District of Columbia Circuit vacated that part of the district court's judgment which denied the request for the production of documents on the grounds of work product privilege.²⁶ The court of appeals agreed with the FTC that the disputed documents were attorney work product. However, the court focused on whether the protection against disclosure of documents deemed to be work product continues several years after termination of the suit which prompted the preparation of the documents.²⁷ The court's analysis of the temporal scope of work product privilege began with the observation that a "'dispute [exists] among the courts as to whether . . . the protection afforded by the [work product] privilege lapses once the litigation has ended or the prospects for litigation have faded.'" ²⁸ After noting that opinions expressed in prior decisions ranged from the view that protection must be

²² Grolier, Inc. v. Federal Trade Comm'n, 1980-1 Trade Cas. (CCH) ¶ 63, 188 (D.D.C.). Actually, Grolier first sought the documents through discovery in the FTC administrative proceedings. However, the documents were not discoverable under the FTC Rules of Practice, and Grolier appealed to the D.C. District Court, where it argued that the FOIA commanded production of the documents. The court ruled that Grolier would have to file a request pursuant to the FOIA before it would consider a contention that the FTC had violated the Act. Grolier, Inc. v. Federal Trade Comm'n, X F.T.C. Ct. Decs. 325 (D.D.C. 1976). Grolier filed its request, pursuant to FOIA, on June 20, 1978. 1980-1 Trade Cas. (CCH) ¶ 63,188 at 77,915.

²³ 1980-1 Trade Cas. (CCH) ¶ 63,188 at 77,915 n.2.

²⁴ *Id.* See note 8 *supra* for the statutory language of Exemption 5.

²⁵ Grolier, Inc. v. Federal Trade Comm'n, 1980-2 Trade Cas. (CCH) ¶ 63,389 (D.D.C.).

²⁶ 671 F.2d at 557. The court of appeals remanded to the district court for consideration of the existence of related litigation. *Id.*

²⁷ *Id.* at 554.

²⁸ *Id.* at 555 (quoting Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 865 (D.C. Cir. 1980)).

perpetual to be effective to the view that no protection exists beyond the immediate litigation,²⁹ the court determined that "[t]he purpose of the privilege . . . 'is to encourage effective legal representation *within the framework of the adversary system* by removing counsel's fears that his thoughts and information will be invaded by his adversary. In other words, the privilege focuses on the integrity of the adversary trial process itself'"³⁰ In the view of the court of appeals, the work product privilege exists only to protect the adversaries from discovery by their immediate opponents. The court concluded that there is no need to extend the privilege beyond the termination of the immediate litigation.³¹ Finally, the court noted that the policy of disclosure inherent in FOIA was consistent with its ruling which denied the Commission the benefit of work product protection.³²

II. TEMPORAL SCOPE OF THE WORK PRODUCT PRIVILEGE

Neither the opinion rendered in *Hickman v. Taylor*,³³ where the United States Supreme Court attempted to clearly articulate the work product doctrine,³⁴ nor Federal Rule of Civil Procedure 26(b)(3),³⁵ which effectively codified that doctrine,³⁶ addresses the question of whether work product is protected in subsequent litigation. Any analysis of the issue must begin with an examination of the policies articulated in *Hickman*, and whether they continue to be relevant once the first litigation has ceased.

Although *Hickman* attempted to resolve the uncertainty concerning the work product doctrine, the decision raised as many questions as it answered.³⁷ Commentators have complained that the opinion's language is loose and vague,³⁸ and that the policies

²⁹ 671 F.2d at 555.

³⁰ *Id.* at 556 (quoting *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 775 (D.C. Cir. 1978)).

³¹ *Id.*

³² *Id.*

³³ 329 U.S. 495 (1947).

³⁴ See 8 C. WRIGHT & A. MILLER, *supra* note 9, at § 2020.

³⁵ FRCP 26(b)(3).

³⁶ C. WRIGHT & A. MILLER, *supra* note 9 at § 2023 & n.14.

³⁷ See *Viront v. Wheeling & Lake Erie Ry.*, 10 F.R.D. 45, 47 (E.D. Pa. 1950) (*Hickman* opened "Pandora's Box"); see generally C. WRIGHT & A. MILLER, *supra* note 9, at § 2022 (decisions went in many directions).

³⁸ See, e.g., Cooper, *Work Product of the Rulesmakers*, 53 MINN. L. REV. 1269, 1272

upon which the decision is based are ill-defined.³⁹ Nevertheless, the basis of *Hickman* is that the efficacy of the adversary system depends on the ability of the lawyer to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference."⁴⁰ This notion reflects the recognition that the adversary system is, at least to a degree, a competitive process, which depends for its accuracy on the clash of opposing viewpoints, with the attorneys marshalling their best arguments to advance their clients' interests.⁴¹ In addition to this basic policy, the Supreme Court in *Hickman* expressed concern that failure to protect work product would produce "inefficiency, unfairness and sharp practices"⁴² with a "demoralizing" effect on the legal profession.⁴³

The court of appeals in *Grolier* indicated that these policies are relevant only between the adversaries of a pending lawsuit.⁴⁴ Yet it is the prospect of future disclosure of thoughts and legal theories, whether utilized or discarded, that may hinder an attorney's preparation of the case at hand. Although *Hickman*'s policies are certainly strongest with respect to the immediate parties, it is not likely that they will totally dissipate upon the conclusion of the suit. Rather, the likelihood that an attorney's private files would be made public at some future time would probably affect his preparation of a case and maintenance of files. The Court in *Hickman* sought to prevent the loss of the sound attorney practice of notetaking as an essential element of trial preparation;⁴⁵ a loss that would be to the detriment of the client and the cause of justice. In addition, such a rule might tempt attorneys to maintain private, "safe" files beyond the reach of discovery, the sort of "sharp practice" the Supreme Court attempted to discourage with the *Hickman* decision.⁴⁶ One court has stated: "[t]he

(1968-69).

³⁹ *Id.* at 1273.

⁴⁰ 329 U.S. at 511.

⁴¹ Note, *Protection of Opinion Work Product Under the Federal Rules of Civil Procedures*, 64 VA. L. REV. 333, 334 (1978).

⁴² 329 U.S. at 511.

⁴³ *Id.* at 516 (Jackson, J., concurring).

⁴⁴ 671 F.2d at 556.

⁴⁵ 329 U.S. at 511.

⁴⁶ See notes 42-43 *supra* and accompanying text.

mischief engendered by allowing discovery of work product recognized in *Hickman* would apply with equal vigor to discovery in future, unrelated litigation.”⁴⁷ Therefore, in order to be effective, the work product protection must be perpetual.

The holding of the court in *Grolier* fails to effectuate the policies of *Hickman*; in addition, it is contrary to the weight of modern authority. Although the *Grolier* decision is consistent with several district court decisions,⁴⁸ the three federal courts of appeals that have considered the issue have found that the work product protection must be perpetual.⁴⁹ Further, the United States Supreme Court has ignored a past opportunity to adopt *Grolier*'s limitation on work product.⁵⁰ It appears that the holding of *Grolier* is incorrect; the Supreme Court has granted certiorari,⁵¹ and should rectify the error.

⁴⁷ *In re Murphy*, 560 F.2d 326, 335 (8th Cir. 1977). The case in which discovery was sought was a civil action brought by the Justice Department against three pharmaceutical firms for alleged fraudulent and illegal patent and marketing activities. *Id.* at 329-30. The case provides an interesting contrast to *Grolier*. In *Murphy* it is the government seeking discovery of work product material and asserting that the privilege is inapplicable in a subsequent lawsuit. For a discussion of *Murphy*, see Comment, *The Potential for Discovery of Opinion Work Product under Rule 26(b)(3)*, 64 IOWA L. REV. 103 (1978).

⁴⁸ See, e.g., *United States v. International Business Mach. Corp.*, 66 F.R.D. 154 (S.D.N.Y. 1974); *Honeywell, Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117 (M.D. Pa. 1970); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 207 F. Supp. 407 (M.D. Pa. 1962).

⁴⁹ *In re Murphy*, 560 F.2d at 326; *United States v. Leggett & Platt, Inc.*, 542 F.2d 655 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480 (4th Cir. 1973).

⁵⁰ In *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 132, plaintiff sought disclosure of certain memoranda prepared by the NLRB Office of General Counsel over a period of five years. The memoranda consisted of attorney recommendations to pursue litigation concerning unfair labor practices or to close particular matters. Recommendations to close were held “final opinions” under 5 U.S.C. 552(a)(2)(A) and so disclosable. *Id.* at 158. Memoranda prepared in contemplation of future litigation was held exempt from disclosure as attorney work product; it should be noted that the Court did not consider *whether the matter had been subsequently closed or whether related litigation existed*. *Id.* at 159-60. Thus, the Supreme Court ignored an opportunity to adopt the position that work product protection terminates with the conclusion of the case.

⁵¹ *Federal Trade Comm'n v. Grolier, Inc.*, 671 F.2d at 553, *cert. granted*, 51 U.S.L.W. at 3362 (U.S. Nov. 8, 1982) (No. 82-372).

III. PROPER ANALYSIS OF WORK PRODUCT IN THE FOIA CONTEXT

Because the court in *Grolier* decided, seemingly incorrectly,⁵² that the work product privilege ends with the conclusion of prior litigation, and, consequently, that the disputed documents were not privileged in the FOIA context,⁵³ it was not necessary to consider the appropriate analysis of the work product privilege in the FOIA context. Assuming, however, that the United States Supreme Court rules that the protection of work product does extend beyond the end of litigation, it will be necessary to determine what documents constitute protected work product within the FOIA context.

Exemption 5 exempts from the disclosure requirements of the Freedom of Information Act "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."⁵⁴ Although the statutory language is somewhat cryptic, the legislative history and subsequent cases make clear that three major classes of privileges were intended: 1) the deliberative privilege;⁵⁵ 2) the attorney-client privilege;⁵⁶ and 3) the attorney work product privilege.⁵⁷ In each case, the source of the privilege must be determined, because the Exemption 5 protection is not coextensive for each class.

Exemption 5 is invoked most often to protect documents which reflect the "deliberative process" of the agency and its employees. These materials, prepared in the course of the agency's decision-

⁵² See notes 33-51 *supra* and accompanying text for a discussion of why this decision was incorrect.

⁵³ 671 F.2d at 556.

⁵⁴ 5 U.S.C. § 552(b)(5) (1976).

⁵⁵ The deliberative privilege permits an agency to use discretion in withholding written materials which represent advisory, recommendatory or draft policy memoranda developed in the predecisional policy-making function. Such materials are protected to preserve the confidentiality of the often sensitive decision-making process. Of course, all final decisions must be disclosed; it is only subjective predecisional material that may be withheld. J. O'REILLY, *supra* note 3, at § 15.07. See also S. REP. NO. 813, 89th Cong., 1st Sess. 9, reprinted in FOIA SOURCEBOOK, *supra* note 2, at 36, 44; H.R. REP. NO. 1497, 89th Cong., 2d Sess. 10, reprinted in FOIA SOURCEBOOK, *supra* note 2, at 22, 31; NLRB v. Sears, Roebuck & Co., 421 U.S. at 151-53.

⁵⁶ 421 U.S. at 149; J. O'REILLY, *supra* note 3, at § 15.11.

⁵⁷ 421 U.S. at 149; J. O'REILLY, *supra* note 3, at § 15.11.

making process, are protected in order to encourage "frank discussion of legal and policy matters" and to avoid forcing the agency to "operate in a fishbowl."⁵⁸ The Supreme Court held in *National Labor Relations Board v. Sears, Roebuck & Co.*⁵⁹ that this protection extends only to "predecisional" materials,⁶⁰ thus balancing the need to protect the decision-making process with the need to avoid "secret law."⁶¹ Most material exempted under this privilege is advisory or subjective in nature. Generally, factual matter is *not* protected,⁶² unless the facts are "inextricably intertwined" with protected material,⁶³ or unless the document is a summary of facts available elsewhere, prepared solely for analytical purposes.⁶⁴

In addition to the protection for materials related to the deliberative process, Exemption 5 is intended to protect certain materials privileged in civil litigation, primarily attorney-client communications⁶⁵ and attorney work product.⁶⁶ The key test stated in the legislative history is whether the documents would "routinely be disclosed"⁶⁷ in civil discovery. Thus, the protections available under Rule 26(b)(3)⁶⁸ are incorporated under Exemption 5.⁶⁹

However, there is an important distinction between the application of Rule 26(b)(3) in civil discovery and in FOIA litigation via Exemption 5. Rule 26(b)(3) provides that a private litigant

⁵⁸ S. REP. NO. 813, 89th Cong., 1st Sess. 9, *reprinted in* FOIA SOURCEBOOK, *supra* note 2, at 44.

⁵⁹ 421 U.S. at 132.

⁶⁰ *Id.* at 151-52.

⁶¹ "Secret law" is a phrase coined by Professor Davis to describe agency use of precedents, policies and guidelines prior to publication or availability to the public. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 797 (1967); *reprinted in* FOIA SOURCEBOOK, *supra* note 2, at 240, 276. The term has gained wide judicial acceptance. *See, e.g.*, 421 U.S. at 153.

⁶² 410 U.S. at 87-88.

⁶³ *Mervin v. Federal Trade Comm'n*, 591 F.2d 821, 826 (D.C. Cir. 1978); *Soucie v. Davis*, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971).

⁶⁴ *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974).

⁶⁵ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 149.

⁶⁶ *Id.* One court has extended Exemption 5 protection to expert work product, normally accorded a limited protection under FRCP 26(b)(4). *Deering Milliken, Inc. v. Irving*, 548 F.2d 1131, 1134-35 (4th cir. 1977).

⁶⁷ 421 U.S. at 149 n.16 (quoting H.R. REP. NO. 1497, 89th Cong., 2d Sess. 10 (1966)).

⁶⁸ FRCP 26(b)(3).

⁶⁹ 421 U.S. at 149.

may override a claim of work product privilege by a showing of "substantial need" and "undue hardship."⁷⁰ In contrast, the FOIA provides no mechanism for considering the needs of the particular litigant;⁷¹ rather, it provides an objective standard. Thus, under FOIA, documents are protected which are "normally privileged" in the civil discovery context⁷² without regard to whether the particular litigant can make a showing of substantial need.

The federal rules contain two classes of attorney work product. The "core" of work product, consisting of the "mental impressions, conclusions, opinions or legal theories"⁷³ of an attorney, is the primary focus of the doctrine. Opinion work product is seldom,⁷⁴ if ever,⁷⁵ discoverable under the federal rules. Consequently, it should *never* be discoverable under FOIA.⁷⁶ This is the class of material at issue in *Grolier*;⁷⁷ thus, the court should have protected the documents as not subject to discovery in civil litigation.

A more difficult question is the extent to which factual material constituting work product may be entitled to protection under Exemption 5. Generally, factual material falling into the "deliberative process" class must be segregated and disclosed.⁷⁸

⁷⁰ FRCP 26(b)(3).

⁷¹ See 421 U.S. at 149 n.16; *Sterling Drug, Inc. v. Federal Trade Comm'n*, 450 F.2d 698, 704 n.4 (1971); *Davis*, *supra* note 61, at 795. Note that in some cases factual material important to a particular party may not be available under the FOIA. Nevertheless, such material may be available under the Federal Rules by a showing of "substantial need." The fact that a FOIA exemption may apply does *not* imply that the information is protected in civil discovery. See *Canal Auth. of Fla. v. Froehke*, 81 F.R.D. 609, 612-13 (M.D. Fla. 1979); *Toran, Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules*, 49 GEO. WASH. L. REV. 843, 848-54 (1980-81).

⁷² 421 U.S. at 149.

⁷³ FRCP 26(b)(3). See *Cooper*, *supra* note 38, at 1283-1301 (hard core of mental impressions, subjective evaluations should be protected).

⁷⁴ 329 U.S. at 512-13; see also *Note*, *supra* note 41, at 341 (rare exceptions may exist).

⁷⁵ *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d at 736 (mental impressions are "immune" from discovery).

⁷⁶ See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 154. However, if a document falls into the affirmative disclosure provision of 5 U.S.C. § 552(a)(2)(A) as a "final opinion," it must be disclosed. 421 U.S. at 158-59. See also *Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967 (7th Cir. 1977) (attorney predecisional memorandum incorporated by reference in a final report becomes a "final opinion" for the purposes of 5 U.S.C. § 552(a)(2)(A)).

⁷⁷ 1980-1 Trade Cas. (CCH) ¶ 63,389 (D.D.C.).

⁷⁸ *EPA v. Mink*, 410 U.S. at 87-88.

Similarly, some courts have held that factual material may never be withheld under Exemption 5, even where the claim is privilege for work product.⁷⁹ Yet, factual material which has been developed by an attorney in anticipation of litigation has sometimes been held protected in civil discovery.⁸⁰ *Hickman* itself concerned a dispute over the discovery of witness statements.⁸¹ There are two factors at work here. First, the need to protect factual material, while relevant, is less compelling than the need to protect subjective work product. Courts might allow disclosure on the theory that it is required by the policy of liberal discovery.

Second, in the FOIA context, courts are reluctant to protect factual work product for fear that the result would swallow the *Mink* rule that factual material is not protected under the deliberative privilege.⁸² The District of Columbia Circuit has expressed the concern that documents, otherwise disclosable, could escape production simply by being cast as attorney work product.⁸³

What is needed is an analysis that recognizes both the agency's legitimate interest in the protection of work product and the need for a limitation on the agency's discretion in withholding properly disclosable material. In order to balance these competing interests, the courts should analyze factual work product to determine whether disclosure would tend to reveal "mental impressions, conclusions, opinions or legal theories of . . . [the] attorney . . . concerning the litigation."⁸⁴ This shifts the focus from the simple

⁷⁹ See, e.g., *Deering Milliken, Inc. v. Irving*, 548 F.2d at 1137-38; *Fonda v. Central Intelligence Agency*, 434 F. Supp. at 505.

⁸⁰ E.g., *Bercrow v. Kidder, Peabody & Co.*, 39 F.R.D. 357 (S.D.N.Y. 1965); *Vinta Oil Ref. Co. v. Continental Oil Co.*, 226 F. Supp. 495, 505-06 (D. Utah 1964); *MacMillan v. General Motors Corp.*, 179 S.E.2d 99 (Ga. Ct. App. 1970).

⁸¹ See 329 U.S. at 500.

⁸² 548 F.2d 1131.

⁸³ See *Mervin v. Federal Trade Comm'n*, 591 F.2d at 825; *Bristol-Myers Co. v. Federal Trade Comm'n*, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970) ("Purely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only 'those internal working papers in which opinions are expressed and policies formulated and recommended.'" (footnote omitted)).

⁸⁴ FRCP 26(b)(3). See 591 F.2d at 826; *Deering Milliken, Inc. v. Irving*, 548 F.2d at 1137-38; *Kent Corp. v. NLRB*, 530 F.2d at 624. For an interesting discussion of the application of a similar analysis to the discovery of compilations prepared in anticipation of litigation, see Note, *Work Product Protection for Compilations of Nonparty Documents: A Proposed Analysis*, 66 VA. L. REV. 1323 (1980).

inquiry of whether the material was prepared "in anticipation of litigation," yet provides protection sufficient to meet the policies of *Hickman*.

Under this analysis, material which is purely factual would in most cases be discoverable, yet without harming an attorney's ability to conduct his or her case. Items such as an evidence summary reflecting counsel's analysis of the relevant facts would not be disclosable.⁸⁵ Legal memoranda in which law and fact are intertwined also would be protected.⁸⁶ This analysis effectively protects sensitive subjective material, while furthering the FOIA's objective of maximum public disclosure consistent with the efficient operation of government.⁸⁷

CONCLUSION

The *Grolier* decision⁸⁸ is important, if it stands, because of its far reaching implications. First, it has the effect of establishing a different rule for the discovery of government attorney work product than for private attorney work product. Discovery of the latter is limited by the relevance requirement of FRCP 26(b)(1);⁸⁹ it may be difficult to meet this requirement in "unrelated litigation."⁹⁰ Of course, since the FOIA creates a right to the production of documents without regard to the existence of pending litigation, there can be no relevance requirement in the FOIA context. Therefore, under the FOIA and the rationale of the *Grolier* decision, government attorney work product, including the "core" of mental impressions, opinions and legal theories, always will be obtainable once the litigation terminates. It seems likely that this prospect could have a chilling effect on the case preparation and file maintenance practices of government attorneys.

Second, the decision has the paradoxical result of making governmental deliberations relating to litigation more easily ob-

⁸⁵ See 591 F.2d at 826.

⁸⁶ See *Soucie v. David*, 448 F.2d at 1077-78.

⁸⁷ See generally FOIA SOURCEBOOK, *supra* note 2, at 38.

⁸⁸ See notes 18-32 *supra* and accompanying text for a discussion of the *Grolier* decision.

⁸⁹ FRCP 26(b)(1); C. WRIGHT & A. MILLER, *supra* note 9, at § 2008-10.

⁹⁰ *Grolier Corp. v. FTC*, 671 F.2d at 556.

tainable than predecisional deliberations which do not relate to litigation. This result is undesirable because no principled distinction can be made based upon the nature of the material that would warrant such different treatment.

Finally, the *Grolier* decision has a broad impact because of the FOIA provision which permits *any* FOIA action to be brought in the district court of the District of Columbia.⁹¹ Thus, the decision of the District of Columbia Circuit effectively preempts the contrary rule prevailing in three other circuits, which accords perpetual work product protection.⁹²

The court of appeals in *Grolier*, in holding that the work product privilege is not perpetual, failed to apply properly the principles underlying the work product doctrine. The United States Supreme Court has granted certiorari. The Court should correct this error and hold that the work product protection is perpetual. The Court also should articulate an analytical standard for the resolution of work product problems in the FOIA area.

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Subsequent to the preparation of this Comment for publication, the United States Supreme Court considered the application of the work product privilege in the context of FOIA litigation in Federal Trade Commission v. Grolier Inc., 51 U.S.L.W. 4660 (U.S. June 7, 1983), rev'g 671 F.2d 553 (D.C. Cir. 1982). The Supreme Court rejected the "related litigation" test applied by the court of appeals, and stated that the test under Exemption 5 was "whether the documents would 'routinely' or 'normally' be disclosed." Id. at 4662. The Court held, consistent with the views of this Comment, that "work-product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared." Id. at 4662.

⁹¹ U.S.C. § 552(a)(4)(B) (1976).

⁹² See note 49 *supra*.

